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FEB 29 2012

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE NEBRASKA SUPREME COURT

S-36-120001

PETITION FOR A RULE CHANGE TO CREATE A VOLUNTARY STATE BAR OF
NEBRASKA: TO ABOLISH NEB. CT. R. CHAPTER 3, ARTICLE 8, AND TO MAKE
WHATEVER OTHER RULE CHANGES ARE NECESSARY TO TRANSITION FROM A
MANDATORY TO A VOLUNTARY STATE BAR ASSOCIATION

Attorney/State Senator Scott Lautenbaugh hereby petitions the Supreme Court to abolish/
strike/repeal Neb. Ct. R. Chapter 3, Article 8 (as noted in the attached documentation in
accordance with Neb. Ct. R. Art. 1 §1-103), and to make whatever other rule changes are
necessary to remove any requirement that attorneys licensed in Nebraska be members of the
Nebraska State Bar Association.

This petition is presented to the Court for the following reasons:

1. In *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the court set forth two activities which justify an integrated state bar and the collection of mandatory dues to support those activities: regulating the legal profession and improving the quality of legal services offered by members of the bar.
2. The Nebraska State Bar Association is not a regulatory agency.
3. While the Nebraska State Bar Association does offer continuing legal education programs and publications allegedly designed to elevate the ethical and educational standards of bar members, these programs and publications are supported by user fees and not by State Bar dues.
4. The Nebraska State Bar Association does not adequately represent the diverse interests of



all attorneys in the State of Nebraska, and in fact, sometimes takes contrary positions to the desires and interests of a wide array of attorneys who are forced to be members. Many of the bar's activities , positions and pursuits represent an unconstitutional violation of the rights of Nebraska attorneys.

5. A voluntary bar would be a more independent bar, free to take positions in the best interests of the public and its own membership.

6. This change would respect the freedoms of speech and association of those Nebraska attorneys who choose not to join.

A memorandum in support of this petition is provided herewith.

Respectfully submitted:

A handwritten signature in dark ink, appearing to read 'Scott Lautenbaugh', is written over a horizontal line.

Scott Lautenbaugh
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IN THE NEBRASKA SUPREME COURT

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S-36-12-0001

MEMORANDUM IN SUPPORT OF PETITION FOR A RULE CHANGE TO CREATE A
VOLUNTARY STATE BAR OF NEBRASKA: TO REPEAL/STRIKE NEB. CT. R. CHAPTER
3, ARTICLE 8, AND TO MAKE WHATEVER OTHER RULE CHANGES ARE
NECESSARY TO TRANSITION FROM A MANDATORY TO A VOLUNTARY STATE
BAR ASSOCIATION

This petition requests this Court to amend and repeal various Supreme Court rules and to take whatever steps may be necessary to convert the Nebraska State Bar Association from a mandatory bar to a voluntary bar. This petition is based on five arguments:

1. In *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the court set forth two activities which justify an integrated state bar and the collection of mandatory dues to support those activities: regulating the legal profession and improving the quality of legal services offered by members of the bar.
2. The Nebraska State Bar Association is not a regulatory agency.
3. While the Nebraska State Bar Association does offer continuing legal education programs and publications allegedly designed to elevate the ethical and educational standards of Bar members, these programs and publications are supported by user fees and not by State Bar dues.
4. The State Bar Association often engages in activities and advocacy that is, at times, in conflict with the interests and desires of portions of their membership.
5. The Bar Association spends considerable sums on staffing, services, advocacy, and/or activities in a manner inconsistent with Keller.



In the case of *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) the United States Supreme Court identified two purposes of integrated state bars for which mandatory dues could be collected and spent: “regulating the legal profession and improving the quality of legal services.” Mandatory state bar dues may not be spent for other purposes: “The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger *regulatory* purpose which justified the required association.” *United States v. United Foods, Inc.*, 533 U. S. 405, 413-14 (2001)(emphasis added). “[S]peech need not be characterized as political before it receives first amendment protection.” *Id.* See also, *Kingstad, et al., v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010).

Second, the Nebraska State Bar Association is not a regulatory agency which regulates the legal profession. Nebraska lawyers pay assessments to support the state disciplinary fund in addition to State Bar Association dues. The Nebraska State Bar Association does not perform one of the functions on which the United States Supreme Court has held that mandatory state bar dues may be spent: regulating the legal profession.

Third, very little of the mandatory dues of the Nebraska State Bar Association are spent for the purpose of “improving the quality of legal services.” This phrase from *Keller* refers back to the prime regulatory purpose cited by the U. S. Supreme Court in upholding the constitutionality of the integrated State Bar of Wisconsin in *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961): to

elevat[e] the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State’s legitimate

interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to obtain the objective also engages in some legislative activity.

The Nebraska State Bar Association does provide continuing legal education programs and publications for the ethical and educational improvement of State Bar members, but, by direction of this Court, those programs and publications are paid for by user fees, not by State Bar dues.

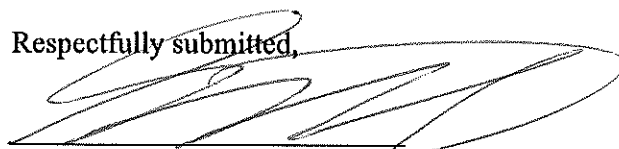
Fourth, often engages in activities and advocacy that is, at times, in conflict with the interests and desires of portions of their membership. The bar frequently weighs in on and lobbys on a wide array of topics which are not within the ambit of of *Keller*. The Nebraska State Bar Association engages in advocacy that does not mutually benefit the entirety of the membership it claims to represent. A voluntary State Bar of Nebraska would be a more independent bar, free to act as its membership sees fit without the constraints imposed on it by *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

Fifth, The Bar Association spends considerable sums on staffing, services, advocacy, and/or activities in a manner inconsistent with *Keller*. Currently, the Bar Association employs approximately 19 staff members to conduct activities in areas that are often unrelated to the purposes stated in *Keller*. This level of staffing is in addition to the employment of a team of lobbyists for legislative lobbying on issues that are not proper for a mandatory bar to weigh in on under *Keller*. Many of these activities would not be considered as frugal stewardship of member dues, nor – more importantly- could they be considered valid pursuits for a mandatory bar association under *Keller*.

Finally, the Court may be concerned with the viability -- financial and otherwise -- of the Nebraska State Bar Association as a voluntary bar. The state bars of our neighboring states of Kansas, Iowa, and Colorado, are active, vibrant, voluntary state bars, as are the voluntary state bars of an additional 18 other states.¹ (Three states have both voluntary and mandatory state bar associations. Twenty-nine states have only mandatory state bar associations.) We see no reason why the Nebraska State Bar Association cannot operate as ably as these other voluntary bars. By offering high quality, more economical services to members, the Nebraska State Bar Association should be able to attract a high percentage of Nebraska lawyers to membership.

Because the State Bar is not a regulatory agency, and because it does not use mandatory dues to pay for educational programs and publications designed to improve the ethics and abilities of Nebraska lawyers, and because a voluntary Bar would be a freer, more independent bar, petitioner respectfully requests this Court to make State Bar membership voluntary by amending and repealing rules as set forth in the attached documentation per the Nebraska Supreme Court Rules and/or by any other steps necessary to transition the Bar from a mandatory to a voluntary organization. A voluntary Nebraska State Bar Association has advantages for the Court, the Bar itself, and the lawyers of Nebraska. The petitioners respectfully urges the Court to approve his petition.

Respectfully submitted,



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¹ Ex: according to bar officials, the Iowa bar's membership is about 91 percent of the total lawyers in Iowa (8,159 members of a total of about 9,000 lawyers in the state).